UNITED STATES OF AMERICA	)	
	)	**Prosecution Response**
v.	)	
	)	**to Defense Motion to**
Manning, Bradley E.	)	**Compel Discovery #2**
PFC, U.S. Army,	)	
HHC, U.S. Army Garrison,	)	**24 May 2012**
Joint Base Myer-Henderson Hall	)	
Fort Myer, Virginia 22211	)	

RELIEF SOUGHT

COMES NOW the United States of America, by and through undersigned counsel, and respectfully requests this Court deny, in part, the Defense Motion to Compel Discovery #2. The prosecution requests that this Court deny the following:

(1) the production, inspection, or *in camera* review of all Defense Intelligence Agency (DIA), Defense Information Systems Agency (DISA), United States Central Command (CENTCOM), United States Southern Command (SOUTHCOM), and Headquarters, Department of the Army (HQDA) records related to the accused, WikiLeaks, and/or damage resulting from the charged offenses for failing to provide a specific request or an adequate basis under RCM 701(a)(2);

(2) the production, inspection, or *in camera* review of all Federal Bureau of Investigation (FBI), Diplomatic Security Service (DSS) Department of State (DoS), Department of Justice (DoJ), Government Agency, Office of the Director of National Intelligence (ODNI), and Office of the National Counterintelligence Executive (ONCIX) records related to the accused, WikiLeaks, and/or damage resulting from the charged offenses under RCM 701(a)(2) because such files are outside the "possession, custody, or control of military authorities," or, in the alternative, for failing to provide a specific request or an adequate basis under RCM 701(a)(2);

(3) the production of all FBI, DSS, DoS, DoJ, Government Agency, ODNI, and ONCIX records related to the accused, WikiLeaks, and/or damage resulting from the charged offenses under RCM 703 for failing to provide a specific request or an adequate basis under RCM 703; and

(4) requiring the prosecution to respond to inquiries relating to its due diligence search for discoverable information as being without a factual or legal basis.

The prosecution continues its Williams and ethical search for Brady material and either has produced, or is diligently working to produce, any discovered material. See United States v. Williams, 50 M.J. 436, 441 (C.A.A.F. 1999); see also Brady v. Maryland, 373 U.S. 83, 87 (1963) (favorable to the accused and material either to guilt or punishment).

BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the defense bears the burden of persuasion on any factual issue, the resolution of which is necessary to decide the motion. Manual for Courts-Martial (MCM), United States, Rule for Courts-Martial (RCM) 905(c)(2) (2008). The burden of proof is by a preponderance of the evidence. RCM 905(c)(1).

FACTS

The prosecution provides the following facts in support of this motion.

I: GOVERNMENT ORGANIZATIONS.

The prosecution agrees with the defense that Army Criminal Investigation Command (CID), DIA, DISA, CENTCOM, and SOUTHCOM are military organizations or entities. See Def. Mot. at 2; see also Appellate Exhibit (AE) XLIX at 4-5; see also AE L at 2.

The prosecution agrees with the defense that the FBI, DSS, DoS, DoJ, Government Agency, ODNI, and ONCIX are not military organizations or entities. See Def. Mot. at 2; see also AE XLIX at 4-5; see also AE L at 4 (defense stated that "[n]o one is disputing what military authorities are").

The prosecution has produced the entire CID case file relating to the accused, WikiLeaks, and/or the damage resulting from the charged offenses and understands its continuing obligation to produce any subsequent material.

The prosecution agrees with the defense that the FBI and DSS participated in a joint investigation with CID of the accused. See Def. Mot. at 2-3; see also AE XLIX at 4-5; see also DoD Directive 5525.7.

The prosecution agrees with the defense that the DoS, DoJ, Government Agency, and ODNI are entities closely aligned with the prosecution. See Def. Mot. at 3; see also AE XLIX at 4-5. The prosecution does not agree that ONCIX is an entity closely aligned with the prosecution. See Williams, 50 M.J. 441.[1] However, in light of the prosecution's existing obligation to search the files of ONCIX, the prosecution does not presently request reconsideration of the Court's ruling. See id.

[1] The ONCIX is a subordinate organization to ODNI. See Office of the National Counterintelligence Executive, About Us, *available at* https://www.ncix.gov/about.php (last visited 22 May 2012). The prosecution is closely aligned with ODNI, however, the prosecution is not closely aligned with all its subordinate organizations, to include ONCIX. The prosecution is not closely aligned with ONCIX because they do not share a working relationship. See AE XLIX at 4-5. The prosecution has not been given access to review all ONCIX records. The prosecution is actively seeking authority to review such records for RCM 701(a)(6) and Brady.

The FBI is a subordinate organization to DoJ. The FBI and DoJ are not Department of Defense (DoD) agencies operating under Title 10 status or subject to a military command. Neither DoD nor any military command exercises control over the FBI or DoJ. See id.[2]

DSS is the security and law enforcement arm of the DoS. The DSS and DoS are not DoD agencies operating under Title 10 status or subject to a military command. Neither DoD nor any military command exercises control over the DSS or DoS. See id.[3]

The ODNI, ONCIX, and Government Agency are not DoD agencies operating under Title 10 status or subject to a military command. Neither DoD nor any military command exercises control over the ODNI, ONCIX, and Government Agency. See id.

II: DEFENSE DISCOVERY REQUESTS.

The prosecution agrees with the defense that, on 8 December 2010, the defense requested the discovery of the "results of any investigation or review by Mr. Russell Travers who has been appointed by President Obama to head an interagency committee assigned to assess the damage caused by Wikileaks exposures and to organize efforts to tighten security measures in government agencies." Def. Mot. at 19(a). On 12 April 2011 and in response to the 8 December 2010 request, the prosecution responded that the "defense has failed to provide any basis for its request." Attachment M to AE VIII. Since 12 April 2011, the defense has not provided any factual basis or legal authority for its request.

The prosecution agrees with the defense that, on 13 October 2011, the defense requested the discovery of "[a]ny report or recommendation concerning the alleged leaks in this case by Mr. Russell Travers, National Security Staff's Senior Advisor for Information Access and Security Policy." Def. Mot. at 19(a). On 27 January 2012 and in response to the 13 October 2011 request, the prosecution responded that the "defense has failed to provide an adequate basis for its request." Attachment M to AE VIII. Since 27 January 2012, the defense has not provided any factual basis or legal authority for its request.

The prosecution agrees with the defense that, on 13 October 2011, the defense requested the discovery of "[a]ny report or recommendation concerning the alleged leaks in this case by Chairman Chuck Hagel or any other member of the Intelligence Advisory Board." Def. Mot. at 19(b). On 27 January 2012 and in response to the 13 October 2011 request, the prosecution responded that it "has no knowledge of any such records, outside publicly made statements through press conferences or media organizations, equally accessible by the defense" and that "[t]he defense is invited to renew its request with more specificity and an adequate basis for its

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[2] From the onset of this case, the prosecution has defined DoJ as Main Justice and the United States Attorney's Offices, and not its subordinate organizations, to include the FBI. See AE XLIX at 5. The DoJ and FBI maintain distinct roles in this case and, as such, are not, and cannot be, synonymous for discovery purposes.

[3] From the onset of this case, the prosecution identified the distinct roles of DoS and DSS in this case. See AE XLIX at 4. The DoS and DSS are not, and cannot be, synonymous for discovery purposes.

request." Attachment M to AE VIII. Since 27 January 2012, the defense has not provided any factual basis or legal authority for its request.[4]

The prosecution agrees with the defense that, on 10 January 2011, the defense requested the discovery of the "results of any inquiry and testimony taken by House of Representative oversight committee led by Representative Darrell Issa. The committee is due to look into Wikileaks, the actions of Attorney General Eric Holder, and the investigation of PFC Bradley Manning." Def. Mot. at 19(c). On 12 April 2011 and in response to the 10 January 2011 request, the prosecution responded that it "has no knowledge of any such records, outside publicly made statements through press conferences or media organizations, equally accessible by the defense." Attachment M to AE VIII. Since 12 April 2011, the defense has not provided any additional information to support its request.

The prosecution agrees with the defense that, on 13 October 2011, the defense requested the "results of any inquiry and testimony taken by House of Representative oversight committee led by Representative Darrell Issa,. The committee discussed the actions of WikiLeaks, the actions of Attorney General Eric Holder, and the investigation of PFC Bradley Manning." Def. Mot. at 19(c). On 27 January 2012 and in response to the 13 October 2011 request, the prosecution responded that it "has no knowledge of any such records, outside publicly made statements through press conferences or media organizations, equally accessible by the defense" and that "[t]he defense is invited to renew its request with more specificity and an adequate basis for its request." Attachment M to AE VIII. Since 27 January 2012, the defense has not provided any additional information to support its request.

III: FORENSIC RESULTS OR INVESTIGATIVE FILES.

On 20 April 2012, the prosecution notified the Court that the DoS has forensic results or investigative files, that the prosecution reviewed those materials for evidence that is favorable to the accused and material to either guilt or punishment, and that the prosecution has produced this material to the defense. See AE LVI.

On 20 April 2012, the prosecution notified the Court that the FBI has forensic results or investigative files and that the prosecution was reviewing those materials for evidence that is favorable to the accused and material to either guilt or punishment. See id. Since then, the prosecution has produced, at a minimum, all evidence from the applicable FBI forensic results or investigative files that is favorable to the accused and material to either guilt or punishment.

On 20 April 2012, the prosecution notified the Court that DIA and ONCIX do not have any forensic results or investigative files. See id.

On 2 May 2012, the prosecution notified the Court that the CIA has forensic results or investigative files and that the prosecution reviewed those materials for evidence that is favorable to the accused and material to guilt or punishment. See Enclosure. Since then, the

[4] The prosecution is in the process of searching for discoverable information from the Intelligence Advisory Board under its ethical responsibilities.

prosecution has produced, at a minimum, all evidence from the CIA forensic results or investigative files that is favorable to the accused and material to either guilt or punishment.

WITNESSES/EVIDENCE

The prosecution does not request any witnesses be produced for this motion. The prosecution requests that the Court consider the Appellate Exhibits referenced herein and the enclosure listed at the bottom of this motion.

LEGAL AUTHORITY AND ARGUMENT

The prosecution respectfully requests this Court deny, in part, the Defense Motion to Compel Discovery #2. The prosecution requests that this Court deny the following:

(1) the production, inspection, or *in camera* review of all DIA, DISA, CENTCOM, SOUTHCOM, and HQDA records related to the accused, WikiLeaks, and/or damage resulting from the charged offenses for failing to provide a specific request or an adequate basis under RCM 701(a)(2);

(2) the production, inspection, or *in camera* review of all FBI, DSS DoS, DoJ, Government Agency, ODNI, and ONCIX records related to the accused, WikiLeaks, and/or damage resulting from the charged offenses under RCM 701(a)(2) because such files are outside the "possession, custody, or control of military authorities," or, in the alternative, for failing to provide a specific request or an adequate basis under RCM 701(a)(2);

(3) the production of all FBI, DSS, DoS, DoJ, Government Agency, ODNI, and ONCIX records related to the accused, WikiLeaks, and/or damage resulting from the charged offenses under RCM 703 for failing to provide a specific request or an adequate basis under RCM 703; and

(4) requiring the prosecution to respond to inquiries relating to its due diligence search for discoverable information as being without a factual basis.

The prosecution continues its Williams and ethical search for Brady material and either has produced, or is diligently working to produce, any discovered material. See United States v. Williams, 50 M.J. 436, 441 (C.A.A.F. 1999); see also Brady, 373 U.S. at 87.

I: THE DEFENSE HAS NEITHER PROVIDED SPECIFICITY NOR STATED AN ADEQUATE BASIS WITH ITS REQUEST FOR ALL DIA, DISA, CENTCOM, AND SOUTHCOM RECORDS RELATED TO THE ACCUSED, WIKILEAKS, AND/OR DAMAGE RESULTING FROM THE CHARGED OFFENSES.

Rule for Courts-Martial (RCM) 701(a)(2) states that, upon defense request, the prosecution shall permit the defense to inspect materials within the possession, custody, or control of military authorities, "which are material to the preparation of the defense or are

intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused[.]" RCM 701(a)(2). The rule is triggered upon a defense request "specifying what must be produced." RCM 701(a), analysis. The "request should indicate with reasonable specificity what materials are sought." Id.; see also United States v. Eshalomi, 23 M.J. 12, 22 (C.M.A. 1986) (a request is specific when it gives "the prosecutor notice of exactly what the defense desire[s]") (citing United States v. Agurs, 427 U.S. 97, 106 (1976) (a request for "'all Brady material' or for 'anything exculpatory' . . . gives the prosecutor no better notice than if no request is made")).

RCM 701(a)(2) is "grounded on the fundamental concept of relevance." United States v. Graner, 69 M.J. 104, 107 (C.A.A.F. 2010). In order to have the military judge compel release of evidence either as discovery under RCM 701 or as evidence production under RCM 703, the defense must establish that the evidence is relevant either to the merits or to sentencing. See id. (holding that "the military judge did not abuse his discretion in determining that the defense did not present an adequate theory of relevance to justify the compelled production of the [document], the only piece of evidence identified with specificity in the defense request") (the military judge did not abuse his discretion in declining to order the production of documents for which the defense failed to meet the burden to compel production); see also AE XXXVI at 9.

The defense argues all DIA, DISA, CENTCOM, and SOUTHCOM records relating to the accused, WikiLeaks, and/or damage resulting from the charged offenses are material to the preparation of a defense because "they will show what, if any, damage was caused by the [charged offenses] which will help the defense prepare both for the merits and sentencing, if necessary."[5] The prosecution requests that this Court deny the defense's request for discovery of all such records under RCM 701(a)(2) for two reasons: first, the defense failed to provide a specific request; and second, the defense failed to provide an adequate basis for why all such records are discoverable.

A. The Defense Failed to Provide Specificity in its Request.

The Court of Military Appeals in Eshalomi reasoned that a request is specific when it gives "the prosecutor notice of exactly what the defense desire[s]." Eshalomi, 23 M.J. at 22 (discussing whether the defense made a specific request for information pretrial) (citing Agurs, 427 U.S. at 106 (a request for "'all Brady material' or for 'anything exculpatory'...gives the prosecutor no better notice than if no request is made")). Here, the defense requests the production of all DIA, DISA, CENTCOM, and SOUTHCOM records, to include all investigative files, related to the accused, WikiLeaks, and/or the damage resulting from the charged offenses under RCM 701(a)(2). The defense defines all records to "include, but not be limited to, documents, reports, analyses, files, investigations, letters, working papers, and damage assessments (or anything that can be reasonably construed as falling within the aforementioned)."[6] Def. Mot. at 4. Though broad in scope, the military discovery process is

[5] The defense clarified its request to include all documents related to the accused, WikiLeaks, and/or the damage occasioned by the alleged compromise. See Def. Mot. at 4.

[6] The defense's request is a classic fishing expedition. See United States v. Batchelor, 19 C.M.R. 452, 525 (A.C.M.R. 1955) (defense may not expect "without basis in law or reason,...the personnel, files, papers, and

"not designed to permit an accused to fish blindly for evidence with only hope for tackle and prayer for bait." United States v. Calley, 46 C.M.R. 1131, 1187 (A.C.M.R. 1973). Given the sheer breadth and substance of the charged misconduct, the prosecution is not on notice of what the defense desires when it requests all records from an organization relating to the accused, WikiLeaks, and/or any damage resulting from the charged offenses.[7] Accordingly, the defense has failed to provide a specific request.

B. The Defense Failed to Provide an Adequate Basis for Discovery.

RCM 701(a)(2) states that, upon defense request, the prosecution shall permit the defense to inspect materials within the possession, custody, or control of military authorities, "which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused[.]" RCM 701(a)(2). RCM 701(a)(2) is "grounded on the fundamental concept of relevance." Graner, 69 M.J. at 107. In order to have the military judge compel release of evidence either as discovery under RCM 701 or as evidence production under RCM 703, the defense must establish that the evidence is relevant either to the merits or to sentencing. See id.; see also AE XXXVI at 9.

Here, the defense argues all such records are discoverable under RCM 701(a)(2) (i.e., "material to the preparation of the defense") because the records "will show what, if any, damage was caused by the [charged offenses] which will help the defense prepare both for the merits and sentencing, if necessary." Def. Mot. at 4. Requesting all records, without limitation, does not demonstrate "an adequate theory of relevance" to justify the compelled discovery of such records. See Graner, 69 M.J. at 108. Absent establishing an adequate threshold standard of relevance, the information cannot be material to the preparation of the defense. See id. at 108. The basis for the request (i.e., what damage, if any, resulted will be material to the preparation of the defense) is inconsistent with the broad scope of the request (i.e., all records relating to the accused, WikiLeaks, and/or any damage from the above organizations).[8]

The defense defines "damage" in its request "broadly to include any mitigation efforts to correct such damage." Def. Mot. at 4.[9] Requesting any mitigation efforts to correct any damage

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resources of the Government be available and fully utilized, without restriction, as counsel might see fit in order to enable him to realize fulfillment of his purely exploratory requests, whether material or not, to pursue his theories of defense, whether with or without basis, and to engage in a pure fishing expedition, all irrespective of any unreasonableness or undue burden on the Government"); see also Graner, 69 M.J. at 108 (ruling that the defense shall "present an adequate theory of relevance to justify the compelled production of [documents]").

[7] Only damage assessments and working papers, relating to a damage assessment, have been specifically requested by the defense. Consistent with the Court Order, dated 23 March 2012, the prosecution is in the process of producing the only damage assessment from any of the above organizations - DIA. See AE XXXVI at 12. By DIA damage assessment, the prosecution means the IRTF damage assessment. The Secretary of Defense directed the DIA to establish the IRTF to lead a comprehensive DoD review of classified documents posted to the WikiLeaks website. See Enclosure to AE LXXII; see also AE XII at 5.

[8] The prosecution estimates all such records would consist of more than 250,000 pages.

[9] The defense's request to define damage "broadly" contradicts any argument that its request puts the prosecution on notice of what the defense desires.

caused by the charged offenses is inconsistent with the defense's proffered basis for its discovery (i.e., to "show what, if any, damage was caused by the [charged offenses]"). The prosecution agrees that some portions of the remedial process may be discoverable under RCM 701(a)(6), Brady, or if the defense can demonstrate an adequate theory of relevance (e.g., portions relevant to the charged offenses). See Graner, 69 M.J. at 108.

II: THE DEFENSE HAS NOT PROVIDED AN ADEQUATE BASIS FOR WHY THE HEADQUARTERS, DEPARTMENT OF ARMY RECORDS, IN ITS ENTIRETY, IS DISCOVERABLE UNDER RCM 701(a)(2).

The prosecution respectfully requests that this Court deny the defense request that the HQDA records be produced in their entirety under RCM 701(a)(2) and RCM 701(a)(6).[10] The prosecution recently received the HQDA records and has been reviewing the records for information discoverable under RCM 701(a)(6) and Brady under its ethical obligations. The prosecution will provide all information within the HQDA records that is discoverable under RCM 701(a)(6) and Brady. However, the defense has neither put the prosecution on notice of what the defense desires nor provided an adequate basis for why all information are "material to the preparation of the defense" under RCM 701(a)(2). The defense offers the conclusory assertion that all HQDA records responsive to the prosecution's request are discoverable under RCM 701(a)(2) without providing an adequate basis for why such records are "material to the preparation of the defense." Absent a specific request with an adequate basis, the prosecution requests that the Court deny discovery under RCM 701(a)(2).

III: THE FBI, DSS, DOS, DOJ, GOVERNMENT AGENCY, ODNI, AND ONCIX FILES ARE NOT WITHIN THE POSSESSION, CUSTODY, OR CONTROL OF MILITARY AUTHORITIES.

The prosecution respectfully requests that this Court deny discovery of all FBI, DSS, DoS, DoJ, Government Agency, ODNI,[11] and ONCIX records related to the accused and/or WikiLeaks under RCM 701(a)(2) because such files are not within the possession, custody, or control of military authorities. See RCM 701(a)(2). Further, the prosecution requests that this Court deny the defense's request for an *in camera* review of such records. In the alternative,

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[10] To clarify, the "HQDA file" referenced by the defense is not an actual "file." Instead, pursuant to its independent ethical obligations and not in response to a defense request, the prosecution requested that HQDA provide documents that may be discoverable under RCM 701(a)(6) and Brady. The documents responsive to the prosecution's request are those at issue. The prosecution has no knowledge of any "file" maintained by HQDA relating to the accused. See AR 25-400-2 (describing a file as an "accumulation of records maintained in a predetermined physical arrangement or to a place documents in a predetermined location according to an overall plan of classification"). Here, any documents responsive to the prosecution's request were not maintained in a predetermined physical arrangement or to a place documents in a predetermined location according to an overall plan. Instead, the HQDA records came from distinct subordinate organizations of the Department of Army. See Attachment A to Defense's Motion.

[11] The defense claims the prosecution "has not turned over any documents by ODNI." The defense is incorrect. The prosecution has produced ODNI documents to the defense. See, e.g., ODNI Classification Review (BATES 00410761-00410770); Intelink logs (BATES 00411153-00411154).

should the Court review the records *in camera*, RCM 701(a)(6) and Brady are the applicable standards of discovery for materials outside the possession, custody, or control of military authorities.

The question before this Court is whether all files of a non-DoD organization that the prosecution is required to search under Williams (i.e., (1) law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses and (2) an entity closely aligned with the prosecution) are within the possession, custody, or control of military authorities. Although there are no military cases defining "military authorities," the plain language, scope and operation of RCM 701(a)(2), coupled with the CAAF ruling in Williams, confirm the term "military authorities" does not extend beyond DoD agencies operating under Title 10 status or subject to a military command. In the alternative, the prosecution does not have both access to, and knowledge of, the requested material.

The prosecution agrees with the defense that the FBI, DSS, DoS, DoJ, Government Agency, ODNI, and ONCIX are not military organizations or entities. See Def. Mot. at 2; see also AE XLIX at 4-5; see also AE L at 4 (defense counsel stated that "no one is disputing what military authorities are."). None of the above organizations are DoD agencies operating under Title 10 status are subject to a military command. Neither DoD nor any military command exercises any control over the above organizations.

A. The Drafters Did Not Intend RCM 701(a)(2) to Extend Beyond the Files of Those Organizations Under Military Authority or Subject to Military Control.

The drafters promulgated RCM 701 to govern discovery after referral. See Graner, 69 M.J. at 107. RCM 701(a)(2) governs the discovery of materials within the possession, custody, or control of military authorities. See RCM 701(a)(2). Defining "military authorities" in this context is a matter of first impression. Absent controlling precedent on this issue, the "rules of statutory construction apply in interpreting the R.C.M." United States v. Hunter, 65 M.J. 399, 401 (C.A.A.F. 2008) (interpreting the provisions of RCM 705); see also United States v. Custis, 65 M.J. 366, 370 (C.A.A.F. 2007) ("[I]t is a well established rule that principles of statutory construction are used in construing the Manual for Courts-Martial in general and the Military Rules of Evidence in particular."). The starting point for statutory interpretation is the plain or ordinary meaning of the language. See United States v. McCollum, 58 M.J. 323, 340 (C.A.A.F. 2003); see also Custis, 65 M.J. at 370 ("When the statute's language is plain, the sole function of the courts…is to enforce it according to its terms."); United States v. James, 63 M.J. 217, 221 (C.A.A.F. 2006) ("[A] fundamental rule of statutory interpretation is that 'courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'") (citing Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992); 2A Sutherland Statutory Construction § 45:2 (7th ed.) ("[A] statute, clear and unambiguous on its face, need not and cannot be interpreted by a court.").

The plain language of RCM 701(a)(2) states that:

> [a]fter services of charges, upon request of the defense, the Government shall permit the defense to inspect: (A) any books,

> papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of military authorities[.]

RCM 701(a)(2)(A). The plain language of the rule requires that the item be within the possession, custody, or control of a *military* authority. See Article 1, UCMJ ("'military' refers to any or all of the armed forces"); see also RCM 102(b) (providing that the "rules shall be construed "to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expenses and delay."). The prosecution defines "military authorities" to include DoD agencies operating under Title 10 status or subject to a military command. This definition is consistent with, or possibly broader than, its application in other court-martials and its interpretation with respect to other Rules for Courts-Martial. See Simmons, 38 M.J. at 381 (requiring trial counsel to make available for inspection a polygraph report in the possession of military investigative authorities); see also RCM 106, 301, 305(f), 405. The FBI, DSS, DoS, DoJ, Government Agency, ODNI, and ONCIX are not DoD agencies operating under Title 10 status or subject to a military command.

The defense's argument hinges on the analysis of RCM 701(a)(2), which provides that the rule "parallels Fed. R. Crim. P. 16(a)(1)(C) and (D)." See Def. Mot. at 5; see also RCM 701(a)(2), analysis; Fed. R. Crim. P. 16(a)(1)(E) ("[U]pon a defendant's request, the government must permit the defendant to inspect…[items]…within the government's possession, custody, or control."). The defense requests that the Court adopt the federal precedent for Rule 16, and not RCM 701(a)(2) defining what is in the possession, custody, or control of military authorities. The defense argues that federal precedent defines "government" under Rule 16 as the "prosecution." Thus, according to the defense, Rule 16 can be synonymously read as follows: "upon defendant's request, the [prosecution] must permit the defendant to inspect…[items]…within the [prosecution's] possession, custody, or control." Under defense's argument, RCM 701(a)(2), in turn, would read as follows: "[U]pon request of the defense, the [prosecution] shall permit the defense to inspect…[items]…within the possession, custody, or control of *military authorities*."

However, there are no cases that define "military authorities" under RCM 701(a)(2) to include the United States Government. Moreover, such a reading would contravene the drafter's intention that RCM 701(a)(2) only apply to items within "military authorities." The rules of discovery clearly contemplate word choice. See RCM 701(a)(1)(C) (relating to materials "in the possession of the trial counsel"). Though RCM 701(a)(2) parallels Rule 16, the two are not identical. Had the drafter intended the scope of RCM 701(a)(2) to apply to files within the possession, custody, or control of the United States Government, the drafters were free explicitly say so by replacing "military authorities" with "United States Government."

The only military case cited by the defense in support of its proposition that RCM 701(a)(2) governs discovery of materials outside military authorities is Charles, a Court of Military Appeals case. See United States v. Charles, 40 M.J. 414 (C.M.A. 1994). In Charles, the defense requested to inspect the training and personnel records of two civilian police officers in the possession of the trial counsel. The trial counsel submitted the records to the military judge for an *in camera* review under RCM 701(g)(2), and the military judge denied discovery as not

being "material to the preparation of the defense." On appeal, the issue was whether the military judge properly denied the defense's request as not being "material to the preparation of the defense" – *not* whether the records were "within the possession, custody, or control of military authorities." Whether the records were "within the possession, custody, or control of military authorities" was not an issue because the trial counsel submitted the records for *in camera* review under RCM 701(g)(2). The records at issue were in the possession of the trial counsel and the trial counsel had authority to produce the records for *in camera* review. The trial counsel had knowledge and access to the document. Those facts do not exist here.

Lastly, the prosecution requests that the Court consider the "administrative workability" of the provision. McCollum, 58 M.J. at 344 (Crawford, C.J., concurring) (citing Geier, 529 U.S. at 873). Extending the definition of "military authorities" beyond military commands or organizations subject to military control would carry drastic implications. Subjecting the files of all closely aligned organizations, under Williams, to open inspection, if "material to the preparation of the defense," would result in a new graymail tactic, a "problem" in discovery practice. See, e.g., MRE 505, analysis; see also AE LIII at 4 (the defense previously highlighted that "the standard of materiality [relating to RCM 701(a)(2)] is not a high one"). Here, such a tactic would lead to nearly insurmountable consequences. For example, if an inspection of all FBI, DSS, DoS, DoJ, Government Agency, ODNI, and ONCIX classified records "material to the preparation of the defense" is allowed, assuming such exist, the defense could flood the Court with MRE 505 procedures, stall the criminal proceeding, and, if the privilege under MRE 505 is invoked in light of national security concerns, inundate those agencies with classification reviews. See RCM 102(b) ("[T]hese rules shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expenses and delay."). Such a result would incent future offenders to expose the files of victim agencies with knowledge that compromising information, particularly highly classified information, would likely stall the criminal proceeding.

B. The Defense's Argument is Inconsistent with the CAAF Ruling in *Williams*.

The CAAF in Williams defined the prosecutor's duty to search for information discoverable under RCM 701(a)(6) and Brady. See id. at 441. In Williams, the CAAF held that the prosecution must exercise due diligence in discovering favorable information and that the scope of this due diligence requirement extends beyond the prosecutor's own files to include:

> (1) the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses; (2) investigative files in a related case maintained by an entity 'closely aligned with the' prosecution; and (3) other files, as designated in a defense discovery request, that involved a specified type of information within a specified entity.

See id. at 441; see also United States v. Mahoney, 58 M.J. 346, 348 (C.A.A.F. 2003) ("the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in this case"). Here, the prosecution shall search, *inter alia*, the files of law enforcement authorities that participated in a joint investigation (i.e., FBI and DSS) and the

investigative files in a related case maintained by an entity closely aligned with the prosecution (i.e., DoS, DoJ, Government Agency, and ODNI[12]) for RCM 701(a)(6) or Brady material. See Williams, 50 M.J. at 441. Contrary to Williams, the defense is requesting the prosecution to broaden its standard of review to include RCM 701(a)(2) material or, in the alternative, to broaden that which is within the prosecutor's own files to include those entities under Williams. See Def. Mot. at 13-4 (arguing that the prosecution has not completed its search for Brady material within "its own files" because the HQDA documents "are clearly in the possession, custody, and control of military authorities"). The CAAF in Williams did not intend such a result. The defense is confusing the RCM 701(a)(2) language with the prosecution's obligation to search for RCM 701(a)(6) and Brady material under Williams.

The prosecution shall search its own files, along with those outlined in Williams, for RCM 701(a)(6) and Brady material – not information that is "material to the preparation of the defense." The CAAF in Williams clearly contemplated all rules of discovery, to include RCM 701(a)(2), when it outlined what discovery standard the prosecution shall use when searching the files of law enforcement authorities that participated in a joint investigation and the investigative files in a related case maintained by an entity closely aligned with the prosecution. The CAAF cited RCM 701(a)(2), yet did not extend this standard to the prosecution's due diligence obligation because that obligation is to search for "favorable" material. See Williams, 50 M.J. at 441; see also Brady, 373 U.S. at 87. Requiring the prosecution to search the entities under Williams for 701(a)(2) material would subsume the ruling in Williams. The defense is confusing the RCM 701(a)(2) analysis with the prosecution's obligations under Williams.

The CAAF in Williams clearly identified the prosecutor's own files from the files of law enforcement authorities participating in the investigation and the investigative files of entities closely-aligned with the prosecution. The defense argues for the whole-cloth inclusion of all records the prosecution shall search under Williams as being "within the possession, custody, or control of military authorities." See Def. Mot. at 5. The defense's request to merge the files of law enforcement authorities participating in the investigation and the investigative files of closely-aligned entities with the prosecutor's own files for RCM 701(a)(2) purposes is inconsistent with Williams. See Williams, 50 M.J. at 441 ("the scope of the due-diligence requirement with respect to government files *beyond the prosecutor's own files* generally is limited to…") (emphasis added)).

The Court has previously held that the prosecution shall only search the above records for RCM 701(a)(6) and Brady material. See AE XXXVI at 12; see also AE LXIX at 2.

C. In the Alternative, the Prosecution does not have both Access to, and Knowledge of, All FBI, DSS, DoS, DoJ, Government Agency, ODNI, and ONCIX Records relating to the Accused or WikiLeaks.

[12] The prosecution is not closely aligned with ONCIX because they do not share a working relationship. See AE XLIX at 4-5. The prosecution has not been given access to review all ONCIX records. The prosecution is actively seeking authority to review such records for RCM 701(a)(6) and Brady. Further, ODNI does not maintain investigative files and is only closely aligned under Williams because they have contributed evidence for the merits.

Defining what is in the "possession, custody, or control of military authorities" is a matter of first impression in the military justice system. If the Court finds federal law instructive in this matter, then Rule 16 should be used as a persuasive authority for this issue. Federal courts interpret information "in the possession of the government" under Rule 16 to include information "of which the prosecutor has knowledge and to which the prosecutor has access." United States v. Bryan, 868 F.2d 1032, 1036 (9th Cir. 1989) ("[A] prosecutor need not comb the files of every federal agency which might have documents regarding the [accused] in order to fulfill his or her obligations under [Rule 16.]"). Whether the prosecution has knowledge of, and access to, information is a "factual determination[] that must necessarily be made on a case-by-case and agency-by-agency basis[.]" See United States v. W. R. Grace, 401 F.Supp.2d 1069, 1078 (2005); see also United States v. Santiago, 46 F.3d 885, 894 (9th Cir. 1995) (stating, however, that the "meaning of 'in the possession of the government'" is a legal question). In Santiago, the Ninth Circuit held that the government had access to Bureau of Prison files because "the government was able to obtain [the accused's] prison file from the Bureau of Prisons." Id., at 894 (stating that "the fact that the Bureau of Prisons and the United States Attorney's Offices are both branches of the Department of Justice would facilitate access by federal prosecutors to prison files").

The prosecution does not have both access to, and knowledge of, all FBI, DSS, DoS, DoJ, Government Agency, and ODNI records relating to the accused and/or WikiLeaks.[13] See Bryan, 868 F.2d at 1036. **To this date, outside what it has already produced to the defense, the prosecution has only limited access to the requested records for the purpose of satisfying its legal and ethical obligation to search for *Brady* and RCM 701(a)(6) material.** Unlike the facts in Santiago, the prosecution can neither obtain nor produce the requested records without the organization's approval and the organizations are not DoD entities. The prosecution does not have approval to disclose all such records from the above organizations, outside those previously produced in discovery. The defense's concern that the prosecution can avoid disclosure under RCM 701(a)(2) simply by keeping the documents in the hands of the agencies is misplaced because the prosecution has no authority to remove the documents from the agencies' hands.

This Court previously contemplated this issue. On 21 March 2012, the Court requested that the prosecution, *inter alia*, respond to whether it has "access" to the IRTF damage assessment. See AE XXXVI at 6-7. The prosecution responded that it "was given limited access for the purpose of reviewing for any discoverable material. The prosecution only has control of the information within the document that is owned by the DoD (military authority)." See id., at 6. The Court made the finding that only "[s]ome of the information in the IRTF damage assessment is under the possession, custody, or control of military authorities." Id., at 10. Similarly, the prosecution has been given limited access to the FBI, DSS, DoS, DoJ, Government Agency, and ODNI records relating to the accused and/or WikiLeaks for the purpose of reviewing for any favorable material, specifically RCM 701(a)(6) and Brady. See Williams, 50

[13] The prosecution is not closely aligned with ONCIX because they do not share a working relationship. See AE XLIX at 4-5. The prosecution has not been given access to review all ONCIX records. The prosecution is actively seeking authority to review such records for RCM 701(a)(6) and Brady.

M.J. at 441.[14] Should the prosecution not have authority to produce information not owned by DoD, the prosecution does not, and cannot, have access to the information for discovery purposes.

IV: ASSUMING, *ARGUENDO*, THE COURT CONCLUDES THAT THE FBI, DSS, DOS, DOJ, GOVERNMENTAGENCY, ODNI, AND ONCIX FILES ARE WITHIN THE POSSESSION, CUSTODY, OR CONTROL OF MILITARY AUTHORITIES, THE DEFENSE CONTINUALLY FAILS TO PROVIDE A SPECIFIC REQUEST AND/OR AN ADEQUATE BASIS UNDER RCM 701(a)(2).

Even assuming this Court concludes that the FBI, DSS, DoS, DoJ, Government Agency, ODNI, and ONCIX files are within the possession, custody, or control of military authorities, the prosecution respectfully requests that the Court deny defense's request for all files from those organizations for failure to provide specificity or an adequate basis for its request. The defense has failed to put the prosecution on notice of what it desires and to provide an adequate basis for why the entire files are "material to the preparation of the defense." See RCM 701(a)(2); see also Calley, 46 C.M.R. at 1187 (the military discovery process is "not designed to permit an accused to fish blindly for evidence with only hope for tackle and prayer for bait"). The prosecution adopts the arguments set forth above in support of its request to deny discovery under RCM 701(a)(2) of the entire files from the requested organizations. See *supra* Section I.

The defense further requests production under RCM 701(a)(2) of the following: (1) any Government Agency forensic results or investigative files and any damage assessment; (2) any documents relating to the Chiefs of Mission review, the WikiLeaks Working Group, the "Mitigation Team," and the DoS's reporting to Congress in December 2010; and (3) DSS files or investigations dealing with Specification 12 or 13 of Charge II.

The prosecution is in the process of disclosing, whether in limited disclosure or in its entirety, any Government Agency forensic results or investigative files and damage assessment that are discoverable under RCM 701(a)(6) and Brady. The prosecution respectfully requests that the Court deny defense's request for *all* Government Agency forensic results or investigative files for failure to provide specificity or an adequate basis for its request. See *supra* Section I.

The prosecution respectfully requests that the Court deny defense's request for any documents related to the Chiefs of Mission, WikiLeaks Working Group, "Mitigation Team," and DoS's reporting to Congress in December 2010 for failure to provide specificity or an adequate basis for its request. The prosecution further requests this Court deny defense's request to have Under Secretary of State for Management Patrick Kennedy be required to testify regarding the requested materials the defense has failed to provide specificity or an adequate basis for why the proffered testimony is relevant. See Graner, 69 M.J. at 108; see also Appellate Exhibit XV. Instead, the defense is requesting Under Secretary Kennedy's testimony as an alternative measure to accomplish its fishing expedition to learn of information to which it should request.

[14] The prosecution has not been given access to review all ONCIX records. The prosecution is actively seeking authority to review such records for RCM 701(a)(6) and Brady.

The prosecution has produced the DSS file relevant to this case. See Appellate Exhibit LVI. The prosecution respectfully requests that the Court deny defense's request for any DSS files or investigation dealing with Specifications 12 or 13 of Charge II for failure to provide specificity or an adequate basis for its request.

V: ALL FBI, DSS, DOS, DOJ, GOVERNMENTAGENCY, ODNI, AND ONCIX DOCUMENTS ARE NOT RELEVANT AND NECESSARY UNDER RCM 703.

Under RCM 703, "[e]ach party is entitled to the production of evidence which is relevant and necessary." RCM 703(f); see also RCM 401 (defining relevance); see also RCM 703(f)(1), discussion ("Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue."). RCM 703 requires that the defense "list the items of evidence to be produced and [] include a description of each item sufficient to show its relevance and necessity." RCM 703(f)(3); see also Graner, 69 M.J. at 108.

RCM 703 is "grounded on the fundamental concept of relevance." Graner, 69 M.J. at 108. In order to have the military judge compel the production of evidence under RCM 703, the defense must establish that the evidence is relevant either to the merits or to sentencing. See id. (holding that "the military judge did not abuse his discretion in determining that the defense did not present an adequate theory of relevance to justify the compelled production of the [document], the only piece of evidence identified with specificity in the defense request"); see also AE XXXVI at 9; see also Calley, 46 C.M.R. at 1187 (the military discovery process is "not designed to permit an accused to fish blindly for evidence with only hope for tackle and prayer for bait").

The defense requests the production under RCM 703 of all FBI, DSS, DoS, DoJ, Government agency, ODNI, and ONCIX documents relating to the accused and/or WikiLeaks. The defense has not provided an adequate basis for why all such documents are relevant and necessary under RCM 703. Further, the defense has not provided a description of each item sufficient to show its relevance and necessity. See RCM 703(f)(3). Absent a proper basis, all documents of each organization, as requested by defense, are not relevant and necessary under RCM 703.[15]

Assuming the FBI records are outside the scope of RCM 701(a)(2), should the defense submit a specific request and provide a proper basis, the FBI records are only discoverable under RCM 701(a)(6) and Brady, and only subject to production under RCM 703. Any material that falls outside these rules generally is not subject to disclosure.[16] The defense argues the prosecution "cannot submit to the defense a redacted version" of documents in discovery, but instead the prosecution must follow the proper procedure under MRE 505. See Def. Mot. at 7-8. Under this logic, for instance, the prosecution shall disclose an entire file *per se* when only a few

[15] The prosecution estimates all such records would consist of more than 250,000 pages.

[16] The documents may be discoverable under Jencks and RCM 914.

sentences therein contain discoverable information. Such a result is inconsistent with any rule of discovery. MRE 505(g)(2) is only necessary when the prosecution requests "limited disclosure." Here, the prosecution submitted full disclosure of discoverable materials contained within the FBI records under MRE 505(g)(1). The defense has not provided an adequate basis or authority for why such material to relevant and necessary under RCM 703.

VI: THE DEFENSE'S REQUEST FOR THE PROSECUTION TO RESPOND TO INQUIRIES RELATING TO ITS DUE DILIGENCE SEARCH FOR DISCOVERABLE INFORMATION IS WITHOUT A FACTUAL BASIS.

The prosecution respectfully requests that the Court deny defense's request for the prosecution to respond to inquiries relating to its due diligence search for discoverable information. There is no legal authority to support defense's request.

Should the Court be inclined to order the prosecution to answer these questions or variations of these questions, the prosecution requests leave of the Court to enable the prosecution to prepare internal memoranda and other attorney work-product, and present this information to the Court *ex parte* under RCM 701(g)(2), based on it being attorney work-product. See RCM 701(g)(2).

VII: THE PROSECUTION CONTINUES ITS *WILLIAMS* AND ETHICAL SEARCH FOR *BRADY* MATERIAL AND EITHER HAS PRODUCED OR IS DILIGENTLY WORKING TO PRODUCE ANY DISCOVERED MATERIAL.

The prosecution shall disclose evidence that is favorable to the defense and material to guilt or punishment. See Brady, 373 U.S. at 87; see also RCM 701(a)(6). The prosecution continues its search under Williams and applicable ethical rules for RCM 701(a)(6) and Brady material and either has produced or is diligently working to produce any discovered Brady material. See Brady, 373 U.S. at 87. See also Appellate Exhibit XLIX.

On 23 March 2012, the Court ordered the prosecution to produce or disclose Brady material contained within the three damage assessments. See AE XXXVI at 12. On 18 May 2012, the prosecution complied with this Order. The Court further ordered the prosecution to search all DoS, FBI, DIA, ONCIX, and CIA forensic results or investigative files, if any, for Brady material. The prosecution has produced this material. See Enclosure.

The prosecution shall, and will, disclose Brady and RCM 701(a)(6) material even in the absence of a defense request. See Jackson, 59 M.J. at 334. The prosecution has produced all classified and unclassified damage assessments that the prosecution discovered under its ethical obligations and for which it has approval to disclose. To date, the prosecution has disclosed twenty-seven damage assessments, pursuant to its ethical obligations and absent a defense request. The prosecution has retrieved eight additional assessments and continues to work diligently to obtain the approvals for those that contain discoverable information.

VIII: THE PROSECUTION WILL DILIGENTLY CONTINUE TO PRODUCE ALL INFORMATION IT INTENDS TO USE IN ITS CASE-IN-CHIEF OR IMPLEMENT MRE 505 PROCEDURES, IF APPLICABLE.

From the onset, the prosecution had a plan on how to efficiently handle the classified information and evidence in this case. Days after referral, the prosecution detailed its plan regarding the procedures, discovery, and production of classified and unclassified information. See AE XX. The prosecution explained the necessity for additional time to obtain approvals to produce classified information, to include coordinating with multiple original classification authorities and implementing MRE 505 procedures. See id.; see also AE XII.

The prosecution intends to use classified and unclassified information in its case-in-chief. See AE XII. The prosecution is diligently working to ensure that it has produced all information, unclassified and classified, that it intends to use in its case-in-chief. Based on the ongoing criminal investigations, additional information is continuously collected and found, and as that information is gathered, the prosecution produces the material that is discoverable under applicable discovery rules. Besides certain classified material which will likely require protections under MRE 505 and has been planned for under the Court's Scheduling Order, the prosecution has produced virtually all information that it intends to use in its case-in-chief.

IX: THE PROSECUTION WILL DILIGENTLY CONTINUE TO PRODUCE ALL INFORMATION IT INTENDS TO PRESENT AT PRESENTENCING PROCEEDINGS OR IMPLEMENT MRE 505 PROCEDURES, IF APPLICABLE.

The prosecution intends to present classified and unclassified information at presentencing proceedings, which the prosecution has contemplated from the onset of this case. See supra Section VIII. The prosecution has already produced unclassified and classified material that it intends to use during presentencing proceedings, and is diligently working to make available for inspection other written material, either through seeking limited disclosure under MRE 505(g)(2) or RCM 701(g), or by invoking the privilege under MRE 505 for portions of the material, as per the Court scheduling order.

CONCLUSION

In sum, the prosecution respectfully requests this Court deny, in part, the Defense Motion to Compel Discovery #2. The prosecution requests that this Court deny the following:

(1) the production, inspection, or *in camera* review of all DIA, DISA, CENTCOM, SOUTHCOM, and HQDA records related to the accused, WikiLeaks, and/or damage resulting from the charged offenses for failing to provide a specific request or an adequate basis under RCM 701(a)(2);

(2) the production, inspection, or *in camera* review of all FBI, DSS DoS, DoJ, Government Agency, ODNI, and ONCIX records related to the accused, WikiLeaks, and/or damage resulting from the charged offenses under RCM 701(a)(2) because such files are outside

the "possession, custody, or control of military authorities," or, in the alternative, for failing to provide a specific request or an adequate basis under RCM 701(a)(2);

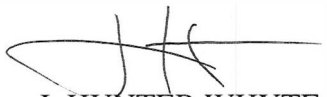
(3) the production of all FBI, DSS, DoS, DoJ, Government Agency, ODNI, and ONCIX records related to the accused, WikiLeaks, and/or damage resulting from the charged offenses under RCM 703 for failing to provide a specific request or an adequate basis under RCM 703; and

(4) requiring the prosecution to respond to inquiries relating to its due diligence search for discoverable information as being without a factual basis.

J. HUNTER WHYTE
CPT, JA
Assistant Trial Counsel

Enclosure
Prosecution Disclosure to the Court, dated 18 May 2012

I certify that I served or caused to be served a true copy of the above on Mr. David E. Coombs, Civilian Defense Counsel, via electronic mail, on 24 May 2012.



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